Supreme Court, U.S.
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No. 99-30

In The

Supreme Court of the United States

H.J. WILSON CO., INC.,

Petitioner,

v.

STATE TAX COMMISSION OF
THE STATE OF MISSISSIPPI,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi

BRIEF IN OPPOSITION

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SUMMARY OF THE ARGUMENT

H.J. Wilson, Co., Inc. (hereinafter "SM") has submitted a petition for certiorari for review of the decision of the Mississippi Supreme Court denying a refund of sales and use taxes. The petition fails, however, to fully explain the ruling and the rationale behind the decision of the Mississippi Supreme Court.

Mississippi exempts qualified newspapers from sales and use tax. In order to qualify for the exemption and meet the definition of a newspaper, six (6) basic criteria must be met. The sixth factor requires the publication to be "originated and published for the dissemination of current news and intelligence of varied, broad and general public interest, announcements, and notices, opinions as editorials on a regular or irregular basis, and advertising and miscellaneous reading matter." Miss. Code Ann. § 27-65-3(l) (1972). This particular factor, and this factor only, was ruled unconstitutionally content-based by the Mississippi Supreme Court. However, the Court specifically pointed out that the remaining five (5) criteria were constitutionally sound and remain valid for purposes of qualifying newspapers for the exemption. App. 34. SM does not meet any of the remaining criteria and would not be exempt under the remaining constitutional portions of the statute, therefore, the Mississippi Supreme Court denied any relief. The court pointed out that this severance of the invalid portion of the statute is fully supported by state case law. App. 34.

Furthermore, the court distinguished the authority relied upon by SM as being rulings declaring a *tax* unlawful or unconstitutional. SM's challenge was to the validity

of an exemption, the tax relating to which being wholly constitutional and uncontested. The Mississippi Supreme Court turned to *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) and *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990) for support of this distinction. There would clearly be a form of relief available if the tax itself had been declared unconstitutional, however, the tax was not challenged by SM – only the exclusion of its advertising materials from the exemption.

ARGUMENT

I. THE MISSISSIPPI SUPREME COURT RULED ONLY A PORTION OF THE STATUTE UNCONSTITUTIONAL

The Mississippi Supreme Court did not find Miss. Code Ann. § 27-65-3 (1972) or the sales tax scheme as it relates to newspapers, to be unconstitutional – only a portion thereof. App. 43. H.J. Wilson, Co., Inc. (hereinafter "SM") attempts to distort the ruling of the Mississippi Supreme Court by expanding it to encompass the entire statute. The Court was clear in its determination that the statute was constitutional except for the provision which was found to be unconstitutionally content-based under the First Amendment. App. 43. Clearly, if the entire statute imposing the tax had been declared unconstitutional, the denial of some form of relief which would be determined by the State court, would have been unjust pursuant to *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

At issue is a list of criteria used by the Mississippi State Tax Commission to determine if a newspaper qualifies for an exemption from sales and use taxes. That list of criteria is found in Miss. Code Ann. § 27-65-3(l) (1972) and is as follows:

> i. Is not published primarily for advertising purposes and has not contained more than seventy-five percent (75%) advertising in more than one half (1/2) of its issues during any consecutive twelve-month period excluding separate advertising supplements inserted into but separately identifiable from any regular issue or issues;
>
> ii. Has been established and published continuously for at least twelve (12) months;
>
> iii. Is regularly issued at stated intervals no less frequently than once a week, bears a date of issue, and is numbered consecutively; provided however, that publication on legal holidays of this state or of the United States and on Saturdays and Sundays shall not be required, and failure to publish not more than two (2) regular issued in any calendar year shall not exclude a periodical from this definition;
>
> iv. Is issued from a known office of publication, which shall be the principal business office of the newspaper and need not be placed at which the periodical is printed and a newspaper shall be deemed to be "published" at the place where its known office of publication is located;
>
> v. Is formed of printed sheets, provided, however, that a periodical that is reproduced by

the stencil, mimeograph or hectograph process shall not be considered a "newspaper."; and

> *vi. Is originated and published for the dissemination of current news and intelligence of varied, broad and general public interest, announcements and notices, opinions as editorials on a regular or irregular basis, and advertising and miscellaneous reading matter.*

[Emphasis added]

The Mississippi Supreme Court held that "subsection (g) of Miss. Code Ann. § 13-3-31(1) [now codified as § 27-65-3(l)(vi)], used by the Commission at the time of assessment in the case sub judice for determining whether a publication qualified as a newspaper for purposes of receiving the sales or use tax exemption, was an unconstitutional content-based criteria for determining which publications qualify for the newspaper sales and use tax exemption." App. 33. However, the Court further held that "the other criteria listed in Miss. Code Ann. § 27-65-3(l) are content-neutral and can stand alone as objective criteria to determine whether a publication qualifies for the newspaper exemption from the imposition of sales and use tax." App. 34. This creates a tremendous distinction between this case and both *McKesson* and *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. 442 (1998). *McKesson* is explained by *Thayer v. South Carolina Tax Commission*, 413 S.E.2d 810 (S.C. 1992) and quoted by the Mississippi Supreme Court in this case as follows:

> Appellant asserts that *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), mandates that

her tax assessment be forgiven. She claims that any attempt to subject her to tax after an exemption is removed would deprive her of due process. We disagree. *McKesson* must be read in conjunction with its companion case, *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990). The Court in *American Trucking* makes it clear that *McKesson* requires relief as a matter of federal law only when taxpayers involuntarily pay a tax that is unconstitutional under existing precedents. *McKesson* is inapplicable when, as here, taxpayers have been subjected to a constitutional tax. The fact that we found section 12-35-550(7) as it pertains to religious publications to be unconstitutional does not render appellant's tax burden unconstitutional. The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption. *John D. Hollingsworth on Wheels, Inc. v. Greenville County Treasurer*, 276 S.C. 314, 278 S.E.2d 340 (1981). Appellant was not entitled to an exemption in the past; nor is she entitled to an exemption now that we have severed that portion of section 12-35-550(7) relating to religious publications. This Court cannot create an exemption by reading something into the statute which the Legislature did not intend. *See Creech v. South Carolina Public Service Authority*, 200 S.C. 127, 146, 20 S.E.2d 645, 652 (1942).

Thayer, 413 S.E.2d at 813-814.

App. 43.

Likewise, in *Newsweek*, following a decision in *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So.2d 1304 (Fla. 1990), the Courts determined the entire statute

exempting newspapers while taxing magazines to be unconstitutional. This creates a significant distinction because the Mississippi Supreme Court simply removed an unconstitutional portion of the statute leaving intact all remaining provisions.

The Court's decision to strike the unconstitutional portion of the statute, leaving intact the remaining criteria, is well grounded in the law. The Mississippi Supreme Court has held that:

> It is the Court's duty in passing on the constitutionality of a statute to separate the valid from the invalid part, if this can be done, and to permit the valid part to stand unless the different parts of the statute are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole, and that if all cannot be carried into effect it would not have enacted the residue independently.
>
> *Wilson v. Jones County Bd. of Supervisors*, 342 So.2d 1293, 1296 (Miss. 1977) (citing *Howell v. State*, 300 So.2d 774, 781 (Miss. 1974); *American Express Co. v. Beer*, 107 Miss. 528, 536, 65 So. 575 (1914); *Adams v. Standard Oil Co.*, 97 Miss. 879, 53 So. 692 (1910); *Campbell v. Mississippi Union Bank*, 7 Miss. 625 (1842)).
>
> App. 33-34.

The remaining criteria found in the statute have been held constitutional, all of which exclude SM from claiming the exemption which the legislature granted to newspapers. The Mississippi Supreme Court found the legislative intent is to grant legitimate newspapers an exemption from sales and use tax. (App. 34). SM is clearly

not a newspaper under the definition and criteria remaining in the statute, after severing a portion thereof.

Petitioner further seeks reliance in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). The *Bacchus* court refused to address remedy issues instead remanding it to the State court for determination. The Court specifically stated that "these refund issues, which are essentially issues of remedy for the imposition of a tax that unconstitutionally discriminated against interstate commerce, were not addressed by the state courts . . . [w]e are reluctant, therefore, to address them in the first instance." *Id.* at 277.

Likewise, in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), this Court deferred the question of remedy to the State courts. In doing so, the Court stated that, "[i]n this case, that choice may well be dictated by the severability clause enacted as part of the intangibles tax statute. N.C. Gen. Stat. § 105-215. That issue, however, as well as the question whether Fulton has properly complied with the procedural requirements of North Carolina's tax refund statute, § 105-267, ought to come before the state courts in the first instance." *Id.* at 347.

It is clear from the authority previously set forth by this Court that the question of severability of the unconstitutional portion of the statutory exemption and any question of proper remedy should be determined by the State court in the first instance. The Mississippi Supreme Court has determined that the invalid portion of the statute is severable, and that the remaining constitutional provisions exclude SM from the exemption provided to newspapers. The Mississippi Supreme Court noted in its

opinion in *Marx v. Broom*, 632 So.2d 1315 (Miss. 1994) that a refund from the levy of an unlawful tax is the appropriate remedy when a tax is assessed under an unconstitutional tax scheme. *Id.* at 1318. App. 42. The court went on to clarify this ruling by stating that *Marx* involved a challenge of a tax as being unlawful and not the exemption from the tax. App. 42. Relying on *Thayer*, the court refused a refund because the taxpayer has been subjected to a constitutional tax. *Thayer*, 413 S.E.2d at 815. "By finding a portion of the criteria used by the Commission as unconstitutionally content-based and severing that unconstitutional criteria from the definition of newspaper, as contained in Miss. Code Ann. § 27-65-3(l), we do not render that the use tax imposed on Service Merchandise was an unconstitional tax burden." App. 43. It is very important to note that SM challenged the constitutionality of a tax exemption and not the imposition of the tax itself. This creates a significant distinction between the authority relied upon by SM and that which is advanced by the Mississippi Supreme Court and the Respondent. The petition for certiorari filed by H.J. Wilson, Co., Inc. should be denied and the decision of the Mississippi Supreme Court affirmed.

CONCLUSION

The Mississippi Supreme Court properly denied any relief to SM based on the severance of the unconstitutional portion of Miss. Code Ann. § 27-65-3(l). The remaining portions were held to be constitutional and excluded SM from any exemption under the statute. Furthermore, SM has not contested the tax or the imposition

of the tax, only the exclusion from the exemption. This distinguishes its challenge from those raised by its cited authority. For the foregoing reasons, the petition for certiorari filed by H.J. Wilson, Co., Inc. ("SM") should be denied and the decision of the Mississippi Supreme Court be affirmed.

Respectfully submitted,

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